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NEW CRIMINAL CODE FOR GERMANY.

Draft of a New Criminal Code for the German Empire.—In October, 1909, there was published the Draft of a German Criminal Code, the work of a commission of five experts chosen from the legal profession by the Imperial Court. The work of the commission is based, in large part, on the "Comparative Presentation of German and Foreign Criminal Law," a monumental work representing the combined efforts of all the noted criminologists of Germany.

The Draft makes no attempt at a revolutionary change in the existing system of German criminal law, but adopts in large part the provisions and even the language of the existing code, with such changes, both omissions and additions, as seem to be demanded by the modern considerations of right and justice. Without committing itself to any one theory of criminal jurisprudence or following any particular scientific trend, the Draft aims at a critical consideration of all the numerous reforms advocated by students of the subject during the last decades. It seems, however, to lean more toward the classical than to the modern school in that it considers the criminal law to be built up on the principle of subjective guilt and that retribution is, in general, the primary purpose of punishment.

The Draft consists of two main parts, a general and a special, the latter of which deals with the various offenses in five books. It omits consideration of the by-laws but includes that of the offenses classified as trespasses, as well as the violations of police ordinances.

The question of changes in the forms of punishments is dealt with as follows: New forms of punishment are not introduced; existing forms retained are: the death penalty, confinement in the penitentiary and in the jail, arrest, fine, and reprimand. Certain precautionary measures are included, in part new in substance; in part, only in form. Imprisonment in the fortress is replaced by arrest, that is, deprivation of liberty without prejudice to the station of the convicted as a citizen. The death penalty for murder is not retained as obligatory but may in the presence of extenuating circumstances be commuted to confinement in the penitentiary for not less than ten years. For penance there is substituted a provision that the trial judge may order the payment of damages up to 20,000 Mk. to one injured by the act committed.

The Draft does little toward clearing up the existing confusion in the different grades of imprisonment, leaving it as before largely to the individual states to draw the dividing line. The three forms of imprisonment, penitentiary, jail, and arrest, are distinguished in a general way by the differences in length of term and severity of treatment, but great latitude is left to the judge in deciding which of the forms of punishment he thinks best to impose in a particular case.

The Draft insists on the separation in confinement of different classes of offenders, as also separation on the basis of sex and age. Labor is required of all prisoners according to the grade of their offenses, and the addition of special elements of severity in the manner of confinement may be ordered by the trial judge himself, a wholly new departure from the existing provisions.

The Draft attempts to meet the criticism directed against the present code to the effect that it fails to give the judge sufficient guidance in the determination of what punishment to impose, by devoting a special subdivision to this question. The use of the concepts of "specially light" and "specially serious" cases is new and seems to permit in the former class the discharge of the prisoner without any punishment whatever.

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It further undertakes to change the existing code in the particulars in which it is criticized as being too harsh: (a) by decreasing the minimum punishments, admitting extenuating circumstances, and permitting the alternative punishment of fines; (b) the extension of previous discharge to all classes of imprisonment; (c) by the adoption of the provisional pardon or parole; (d) rehabilitation and the cancelling of the sentence on the record; (e) by a change in the law regarding juvenile offenders, by (1) advancing the age limit of criminal irresponsibility to 14 years; (2) abolishing the unsatisfactory concept of "the discernment requisite to a realization of culpability; (3) leaving it open to the judge to commit the offender to an institution for training under state supervision; (f) the development of the concept of diminished mental responsibility; besides changes in a number of individual cases in which the existing code is charged with too great severity. On the other hand the treatment of confirmed criminals is made more severe, by making the commission of a second offense an obligatory ground for increased punishment, and incorrigibility is given especial weight as a ground for increasing the punishment.

The Draft goes even farther than the present code in punishing idleness and disorderliness, particularly in attacking drunkenness and distinguishing clearly between precautionary punitive measures as regards these offenses.

The matter of prostitution is treated with all frankness and, eschewing all hypocrisy and recognizing the existence of the evil and undertaking merely its proper control. Drunkenness is given especial attention, primarily with a view to the treatment of habitual drunkards by commission to an asylum for treatment. The admissibility of the plea of voluntary drunkenness as a defense to criminal prosecution is in great measure reduced.

In the matter of punishability for criminal attempts the Draft also goes farther than the existing law by providing that "whoever shall have begun the execution of a felony or an intentional misdemeanor which has not been consummated shall be punishable for criminal attempt."

In the consideration of the difficult question of subjective guilt, which the present code fails to treat, the Draft offers an attempted solution, by distinguishing between intent, negligence and mistake. "The intent is always punished, negligence always in case of trespasses in so far as the law does not conclusively presume intent; in misdemeanors only when the law expressly demands it."¹

¹Furnished by H. G. James, J. D., member of the Illinois Bar.